

## **R430. Health, Health Systems Improvement, Child Care Licensing.**

### **R430-6. Background Screening.**

#### **R430-6-1. Authority.**

(1) The Utah Code, Section 26-39-107, requires that a Bureau of Criminal Identification ~~[screening, referred to as BCI,]~~(BCI) screening be conducted on each person requesting a ~~license~~to be licensed or residential certificate or to renew a license or certificate for existing, new, and proposed owners, directors, members of the governing body, employees, providers of care and volunteers, except parents of children enrolled in the child care program.

(2) ~~[The]~~Utah Code, Section 26-39-104, requires the Department to make and enforce rules to protect children's common needs for a safe and healthy environment and provide for competent care givers. The Department shall review the licensing information system for licensing and certification purposes pursuant to Section 62A-4a-116.2 to screen for individuals who may have a supported finding of severe abuse and neglect by the Department of Human Services or substantiated finding by a Juvenile court under Subsection 78-3a-320.

#### **R430-6-2. Purpose.**

The purpose of the screening process using the BCI criminal background and child and adult licensing information system is to protect children receiving services in a child~~day~~ care program. ~~The [C]riminal [B]background [S]creening [(CBS)]~~ process determines whether a covered individual has been convicted of any crime. In addition, the Department screens all individuals using the licensing information system and court records under Subsection 78-3a-320(4) which is limited to:

- (1) ~~[S]~~supported findings of severe abuse or neglect;
- (2) ~~[A]~~an adjudication of severe child abuse or neglect by a court of competent jurisdiction; and
- (3) ~~[A]~~any criminal conviction or guilty plea related to neglect, physical abuse, or sexual abuse of any person.

#### **R430-6-3. Definitions.**

Terms used in this rule are defined in Title 26, Chapter 39. In addition:

(1) "Convicted" includes a conviction by a jury or court, a deferred judgment and sentence agreement, a deferred prosecution agreement, a deferred adjudication agreement, a plea in abeyance, and a plea of guilty or nolo contendere.

~~[4](2) "Covered Individual" means [any person that has unsupervised contact with children listed in Utah Code Ann. Subsection 26-39-107(a)]:~~

- (a) owners;
- (b) directors;
- (c) members of the governing body;
- (d) employees;
- (e) providers of care, including children residing in a home where child care is provided;
- (f) volunteers, ~~[including]~~ excluding parents of children enrolled in the program ~~[that have unsupervised contact with children in the child care facility];~~ and
- (g) all adults residing in a residence where child care is provided.

~~[2](3) "Department" means the Utah Department of Health.~~

~~[3](4) "Direct supervision" means that the care giver can see and hear the children under age six, and is near enough to intervene when needed. Care givers must be able to hear school-~~

age children and be near enough to intervene.

[4](5) "Supported" means a finding by the Utah Department of Human Services (DHS), at the completion of an investigation by DHS, that there is a reasonable basis to conclude that one or more of the following severe types of abuse or neglect has occurred:

- (a) if committed by a person 18 years of age or older;
  - (i) severe or chronic physical abuse;
  - (ii) sexual abuse;
  - (iii) sexual exploitation;
  - (iv) abandonment;
  - (v) medical neglect resulting in death, disability, or serious illness;
  - (vi) chronic or severe neglect; or
  - (vii) chronic or severe emotional abuse
- (b) [4]if committed by a person under the age of 18:
  - (i) serious physical injury, as defined in Subsection 76-5-109(1)(d) to another child which indicates a significant risk to other children, or
  - (ii) sexual behavior with or upon another child which indicates a significant risk to other children.

[5](6) "Unsupervised Contact" means contact with children that provides the unsupervised person opportunity and probability for personal communication or touch when not under the direct supervision of a child care provider or employee.

[6](7) "Volunteer" means an individual who is not directly compensated for providing care~~[-, including parents of children enrolled in the program,]~~ whose duties assigned by a child care provider or employee include unsupervised contact in a child care facility with children or food consumed by children on a regularly scheduled basis of one or more times per month.

#### **R430-6-4. Exclusions from Criminal Background Screening, Emergency Care Providers.**

~~[(1) Any person, including those that would otherwise be covered individuals, involved with a child care facility that the Department is reasonably satisfied will not have unsupervised contact with children is not required to submit information for a criminal background screening.~~

~~[(2)]~~In an emergency, not anticipated in the provider's emergency plan, a provider may assign a person who has not had a criminal background screening to care for and have unsupervised contact with children.

[a](1) That person shall make a signed, written declaration to the provider that the person has not been convicted of a felony or misdemeanor and has not been investigated with a supported finding from the Department of Human Services.

[b](2) During the term of the emergency, that person may be counted as a provider of care for purposes of maintaining the required care provider to child ratios.

[e](3) The provider shall make reasonable efforts to minimize the time that this person has unsupervised contact with children.

#### **R430-6-5. Criminal Background Screening through the Utah Division of Criminal Investigation and National Criminal History Records.**

(1) Each child care provider requesting a residential certificate~~[-, to be licensed]~~or license or to renew a license or residential certificate to provide child care shall submit to the Department the name and other identifying information on all covered individuals involved with the child care facility at the time the application is filed. A fingerprint card, waiver and fee,

prepared either by the local law enforcement agency or an agency approved by local law enforcement, shall also be submitted unless an exception is granted under (4) below.

(2) The request for a certificate or a license submitted by the provider shall require the provider to state in writing, based upon the provider's best information and belief, that no ~~person who will have unsupervised contact with a child receiving care,~~ covered person, including the provider's own children, has ever been convicted of a felony, misdemeanor or had a consent to a supported finding from DHS or a substantiated finding from a juvenile court of severe abuse or neglect of a child. If the provider is aware of any such conviction or supported or substantiated finding, the Department shall obtain information from the provider to assess the threat to children consistent with R430-6-~~5~~6.

(3) After a license or certificate is issued or renewed, within five ~~(5)~~ days of a new covered individual becoming involved with a child care facility, the child care facility~~[-or]~~ licensee or certificate holder must submit the identifying information. A fingerprint card, waiver and fee, prepared either by the local law enforcement agency or an agency approved by local law enforcement, shall also be submitted unless an exception is granted under (4) below.

(4) Fingerprint cards are not required if the Department is reasonably satisfied that:

- (a) the covered individual has resided in Utah for the last five years;
- (b) the covered individual has previously submitted fingerprints under this section for a national criminal history record check and has resided in Utah continuously since that time; or
- (c) as of May 3, 1999, the covered individual was involved with a child care facility in a covered individual capacity and has resided in Utah continuously since that time.

(5) If a covered individual has resided in Utah for the last five years, except for religious or military service out-of-state, the covered individual shall submit to the Department a letter from their clergy or commanding officer documenting that the covered individual was not convicted of any felony or misdemeanor during the time period of the religious or military service. The covered individual shall then be deemed to have resided in Utah for the last five years and not be required to submit fingerprint cards.

(6) The Department shall perform a criminal background screening, which includes a review of the BCI database ~~[of the Utah Division of Criminal Investigation and Technical Services within]~~ maintained by the Department of Public Safety ~~[(BCI)]~~ pursuant to Part 2 of Chapter 10, Title 53; and if a fingerprint card, waiver and fee were submitted; the Department shall forward the fingerprint card, waiver and fee to the Utah ~~[Division of Criminal Investigation and Technical Services]~~ Department of Public safety for submission to the FBI for a national criminal history record check.

(7) If the BCI portion of the criminal background screening indicates that the covered individual has a conviction for a felony or misdemeanor, regardless of any exception under (4) above, the covered individual shall submit a fingerprint card, waiver and fee upon request by the Department.

(8) The Department shall review any criminal convictions, consistent with R430-6-~~5~~6, to determine if action should be taken to protect the health and safety of children receiving child care in the facility.

(9) If the Department takes an action adverse to any covered individual, based upon the criminal background screening, the Department shall send a written decision ~~[Notice of Agency Action]~~ to the child care provider and the covered individual explaining the action and the right of appeal.

**R430-6-6. Exclusion from Child Care Due to Criminal Convictions or Pending Charges.**

(1) As required by Utah Code Ann. Subsection 26-39-107(2), if the criminal conviction was a felony, or is a misdemeanor that is not excluded under paragraphs (2) or (3) below, the covered individual may not provide child care, volunteer, or own or operate a child care program with a license or certificate issued by the Department. If such a covered individual resides in a home where child care is provided, the Department shall revoke an existing license or certificate and refuse to permit child care in the home ~~[until the Department is reasonably convinced that the covered individual no longer resides in the home or will not have unsupervised contact with any child in care at the home].~~

(2) As allowed by Utah Code Ann. Subsection 26-39-107(3)(a), the Department hereby excludes the following misdemeanors and determines that a misdemeanor conviction listed below does not disqualify a covered individual from providing child care:

(a) any class B or C conviction under Chapter 6, Title 76, Offenses Against Property, Utah Criminal Code;

(b) any class B or C conviction under Chapter 6a, Title 76, Pyramid Schemes, Utah Criminal Code;

(c) any class B or C conviction under Chapter 8, Title 76, Offenses Against the Administration of Government, Utah Criminal Code;

(d) any class B or C conviction under Chapter 9, Title 76, Offenses Against Public Order and Decency, Utah Criminal Code, except for 76-9-301.8, Bestiality; 76-9-702, Lewdness; and 76-9-702.5, Lewdness Involving Child; and

(e) any class B or C conviction under Chapter 10, Title 76, Offenses Against Public Health, Welfare, Safety and Morals, Utah Criminal Code, except for 76-10-1201 to 1229.5, Pornographic and Harmful Materials and Performances; 76-10-1301 to 1314, Prostitution; and 76-10-2301, Contributing to the Delinquency of a Minor.

(3) Only [T] the Executive Director may[exclude]consider and approve individual cases where a covered individual with a misdemeanor conviction will be allowed to provide child care, that would otherwise be excluded by this rule.[, on a case-by-case basis, other misdemeanors not covered under paragraph (2) of this section if the misdemeanor did not involve violence against a child or a family member or unauthorized sexual conduct with a child.] This authority may not be delegated. The following factors will be used ~~[in deciding under what circumstance, if any, the covered individual will be allowed to provide child care, volunteer, or own or operate a child care program with a license or certificate issued by the Department]:~~

(a) ~~t~~[T]ypes and number of offenses;

(b) ~~p~~[P]assage of time since the offense was committed; offenses more than five years old will not bar approval or a license, certificate or employment;

(c) ~~c~~[C]ircumstances surrounding the commission of the offense;

(d) ~~i~~[I]ntervening circumstances since the commission of the offense; ~~and~~

(e) ~~r~~[R]elationship of the facts under subsections (a) through (d) of this section to the individual's suitability to work with children~~[-];~~

(f) a review of the narrative describing the circumstances of the arrest or conviction and the degree of involvement;

(g) evidence of rehabilitation, counseling, or completion of treatment programs; and

(h) consideration of whether the offense involved any form of violence against any person or inappropriate sexual conduct with any person.

(4) The covered individual shall supply at a minimum the following in support of the

request for action by the Executive Director.

(a) three sworn and notarized witness letters of personal reference attesting to the rehabilitation; and

(b) a copy of the police report and the court report.

[4](5) The Department shall rely on the criminal background screening as conclusive evidence of the conviction and the Department may revoke or deny a license, certificate and employment based on that evidence.

[5](6) If the covered individual is denied a license, certificate or employment based upon the criminal background screening and the covered individual disagrees with the information provided by the Criminal Investigations and Technical Services Division, the covered individual may challenge the information as provided in Utah Code Ann. Sections 77-18-10 through 77-18-15.

[6](7) All child care providers must report all felony and misdemeanor arrests, charges or convictions of covered individuals to the Department within 48 hours.

#### **R430-6-7. Licensing Information System.**

(1) Pursuant to Utah Code Subsection 26-39-104(1)(a)(ii) the Department shall screen all covered individuals, including children residing in a home where child care is provided, for a history of supported finding of severe abuse, neglect, or exploitation from the licensing information system maintained by the Utah Department of Human Services (DHS) and the juvenile court records.

(2) If a covered individual appears on the licensing information system, the Department shall assess the threat to the safety and health of children. The Department may revoke any existing license or certificate and refuse to permit child care in the home until the Department is reasonably convinced that the covered individual no longer resides in the home~~[or will not have unsupervised contact with any child in care at the home]~~.

(a) Upon request, the Department may permit the covered individual to be employed under supervision until a decision is reached, and if the applicant can demonstrate that the work arrangement does not pose a threat to the safety and health of children being served in the licensed or residential certificate child care setting.

(b) The Department may hold the license, certificate or employment denial in abeyance until DHS or the Juvenile court renders a decision, ~~[if a]~~while the covered individual appeals the supported finding.

(3) If the Department denies or revokes a license, certificate or employment based upon the licensing information system, the Department shall send a written decision ~~[Notice of Agency Action]~~ to the licensee and the covered individual.

(4) If the covered individual disagrees with the supported finding of severe abuse or neglect, any appeal must be directed to and follow the process established by Subsection 62A-4a-116.1. If the covered individual consents to the supported finding of severe abuse or neglect that was the basis of the Department's denial or revocation, but disagrees with the action taken by the Department, the covered individual may request a hearing with the Department.

(5) If the DHS determines a covered individual has a supported finding of severe abuse, neglect or exploitation after the Department issues a license, certificate or grants employment; the licensee and covered individual has five working days to notify the Department. Failure to notify the Department may result in revocation of the license or certificate.

#### **R430-6-8. Covered Individuals with Arrests or Pending Criminal Charges.**

(1) If the Department determines there exists credible evidence that a covered individual has been arrested or charged with a felony or a misdemeanor that would not be excluded under R430-6-~~[5]~~6(2), the Department shall act to protect the health and safety of children in child care that the covered individual may have contact with. The Department may revoke or suspend any license or certificate of a provider if necessary to protect the health and safety of children in care.

~~[(2) Upon request, the Department may permit the covered individual to be employed under supervision until the felony or misdemeanor charge is resolved, if the Department is satisfied that the work arrangement does not pose a threat to the safety and health of children being served in the licensed or residential certificate child care setting.]~~

~~[(3)]~~2) If the Department denies or revokes a license, certificate or restricts employment based upon the arrest or felony or misdemeanor charge, the Department shall send a written decision~~[Notice of Agency Action]~~ to the licensee and the covered individual notifying them that a hearing with the Department may be requested.

~~[(4)]~~3) The Department may hold the license, certificate or employment denial in abeyance until the arrest or felony or misdemeanor charge is resolved.

#### **R430-6-9. ~~[Penalties.~~**

~~The department may impose civil monetary penalties in accordance with Title 63, Chapter 46b, Administrative Procedures Act, if there has been a failure to comply with the provisions of this chapter, or rules promulgated pursuant to this chapter, as follows:~~

~~—— (1) if significant problems exist that are likely to lead to the harm of a child, the department may impose a civil penalty of \$50 to \$1,000 per day; and~~

~~—— (2) if significant problems exist that result in actual harm to a child, the department may impose a civil penalty of \$1,050 to \$5,000 per day.]~~**Statutory Penalties.**

(1) A violation of any rule is punishable by administrative civil money penalty of up to \$5,000 per day as provided in Utah Code Section 26-39-108 or other civil penalty of up to \$5,000 per day or a class B misdemeanor on the first offense and a class A misdemeanor on the second offense as provided in Utah Code, Title 26, Chapter 23.

(2) The Department may impose an administrative civil money penalty of up to \$100 per day to a maximum of \$10,000 for each violation of the Child Care Licensing Act or the rules promulgated pursuant to that act.

(3) Any person intentionally making false statements or reports to the Department may be fined \$100 for each violation to a maximum of \$10,000.

(4) Assessment of any civil money penalty does not preclude the Department from also taking action to deny, revoke, condition, or refuse to renew a license or certificate.

(5) Assessment of any administrative civil money penalty under this section does not preclude injunctive or other equitable remedies.

**KEY: child care facilities**

**[March 13, 2003]2005**

**26-39**

**Notice of Continuation January 10, 2003**